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# Order on Defendants' Second Motion for Summary Judgment (Etowah Environmental Group LLC)

Melvin K. Westmoreland  
*Fulton County Superior Court, Judge*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



ETOWAH ENVIRONMENTAL GROUP, LLC, )

*Plaintiff,* )

v. )

MICHAEL WALSH, CHRISTOPHER BEALL, )

ADSTAR WASTE HOLDINGS CORP., and )

HIGHSTAR CAPITAL FUND II, L.P., )

*Defendants.* )

CIVIL ACTION NO. 2012-CV-211149

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**ORDER ON DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on the Motion for Summary Judgment of Defendants AdStar Waste Holdings Corp. ("AdStar"), Highstar Capital Fund II, L.P. ("Highstar"), Michael Walsh ("Walsh"), and Christopher Beall ("Beall," together with AdStar, Highstar, and Walsh, "Defendants"). Upon consideration of the briefs and materials submitted on the motion, oral argument of counsel and the record of the case, this Court finds as follows:

Plaintiff and non-party Advanced Disposal Services, Inc. ("ADS") owned Federal Road, LLC ("Federal Road"), through which they owned and operated the Eagle Point Landfill located in Forsyth County, Georgia. Plaintiff owned twenty-five percent and ADS owned seventy-five percent of Federal Road.

In 2006, ADS and Defendants began to discuss the prospect of Defendants' acquisition of ADS. The Federal Road Operating Agreement provides that Federal Road could be merged into ADS upon ADS' election, which would then trigger Plaintiff's right to an appraisal of its shares. Additionally, Plaintiff contends and for purposes of this motion Defendants do not dispute, Plaintiff could also elect to exercise "tag-along" rights upon a change in control which would

permit Plaintiff to “tag along” to the deal negotiated by ADS upon the same incremental price and on the same terms and conditions.

Defendants made three offers to purchase ADS in total. On May 5, 2006, Walsh wrote to ADS and offered to purchase its shares for \$425 million with a valuation of Federal Road between \$62 and \$65 million. On May 10, 2006, Defendants increased the offer for ADS by \$25 million to \$450 million, but decreased the value of Federal Road to between \$45.5 million and \$47 million. Finally, on May 19, 2006, Defendants raised the offer for ADS to \$470 million with an allocation of \$45.5 million to Federal Road.

On June 13, 2006, ADS officers met with Plaintiff and revealed the \$45.5 million offer for Federal Road. Plaintiff was not told about the \$65 million valuation placed on Federal Road in the first offer letter. At that meeting Plaintiff was given the choice to either tag along at its proportionate share of the \$45.5 million offer or be subject to the appraisal process, which Plaintiff contends imposed unfavorable rules and limits as required under the Federal Road Operating Agreement on the method of apportioning value to its shares. Due to its alleged reliance on the \$45.5 million price Plaintiff elected to pursue its appraisal rights which ultimately led to litigation and then arbitration with ADS over the parties’ dispute of the appraisal process. Plaintiff ultimately received \$26.4 million against ADS and one of its principals which included the value of its interest in Federal Road.

Now, Plaintiff has asserted claims against Defendants based on their alleged conduct in conspiring with ADS to purposely undervalue Federal Road so the buy-out of Plaintiff’s interest would be cheaper. On August 17, 2012, this Court entered an Order denying Defendants’ motion for summary judgment filed early in the case. Following discovery Defendants then filed this second motion for summary judgment. Now, afforded the opportunity to review to a more

complete record while focused on the doctrine of collateral estoppel, the Court has a different opinion regarding the merits of the case and concludes Plaintiff is precluded from re-litigating the value of its interest in Federal Road which was already determined by the arbitration panel. Accordingly, Defendants' motion is **GRANTED**.

Collateral estoppel, or issue preclusion, applies where an issue of fact or law is actually litigated and determined by a valid judgment and the determination is essential to the judgment. Macon Water Authority v. City of Forsyth, 262 Ga. App. 224 (2003). As with claim preclusion, or res judicata, issue preclusion requires that: (1) both proceedings must involve the same parties or their privies; (2) there must have been a decision on the merits; and (3) the party against whom the doctrine is asserted must have had a full opportunity to litigate the issue in question. Id. Issue preclusion is not dependent, however, on the two causes of action being the same; rather, it precludes issues that were actually adjudicated in the prior proceeding, as well as issues that necessarily had to be decided in order for the previous judgment to have been rendered. Burnett v. Slatter, 286 Ga. 169 (2009).

In the prior arbitration, the panel crafted its own determination of the value of Plaintiff's interest in Federal Road (rather than applying the appraisal method established under the Operating Agreement) by determining Federal Road's historical EBITDA for the 12 months prior to the merger and multiplying that figure by a factor of 9.8, which was based on the industry average multiple for integrated landfills previously used by Defendants.

Now Plaintiff seeks to recover under a slightly different valuation method which it argues reflects "tag-along" value. This valuation analysis takes the full amount Defendants paid for ADS (\$470M) and attempts to ascribe value to Federal Road by allocating its proportionate

amount of that figure. Plaintiff contends the valuation analysis performed by the arbitrators differs from the “tag-along” value Plaintiff is currently pursuing.

The Court has reconsidered the viability of this distinction. When the Court first visited Defendants’ dispositive arguments the Court was persuaded, in theory, there could be a gap between “appraisal” and “tag-along” value. Theoretically, tag-along rights (based on the actual price achieved by an asset) may be different than appraisal rights (based on a variation of fair market value). However, the complication in this case is there was no actual purchase price paid for Federal Road, which is the metric a tag-along figure is supposed to represent. Instead, the “tag-along” value of Federal Road must be extracted from the total value of ADS, which necessarily requires the differing valuation techniques (and the same battle of valuation experts) akin to any other appraisal valuation.

The Court finds the arbitration panel fully adjudicated the valuation of Federal Road. Simply put, because Plaintiff has hired a different expert here, who may be able to concoct another valuation opinion or ascribe a different multiple to Federal Road’s EBITDA value<sup>1</sup>, does not warrant another day in court. In any event, the Court is not persuaded Plaintiff’s analysis here, framed by the price actually achieved for ADS, reflects a substantive difference to signify a separate claim. Accordingly, the Court finds the issue of Plaintiff’s interest in Federal Road was litigated and determined in the arbitration proceeding.

Turning now to the next disputed element of issue preclusion, the Court is satisfied Defendants were in privity with ADS and Mr. Appleby, defendants in the arbitration proceeding,

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<sup>1</sup> Plaintiff’s expert merely reverse-engineers a methodology strikingly similar to that performed by the panel—he just starts with a different ADS asset (determines historical EBITDA, ascribes a multiple based, in part on Defendants’ past purchase history) to back in to a value he opines should be afforded to Federal Road based on the ADS purchase price.

to satisfy this element of Georgia's issue preclusion doctrine. Plaintiff alleges Defendants conspired with ADS and Appleby to undervalue its interest, and "co-conspirators are considered to be in privity for purposes of res judicata." Brewer v. Schacht, 235 Ga. App. 313, 315 (1998). Further, Plaintiff had a sufficient opportunity to litigate its loss of "tag-along" rights in the arbitration panel. All the facts on which the instant claims are now based were known to Plaintiff prior to the arbitration and Plaintiff made Defendants' conduct known to the panel which was persuaded to adopt Plaintiff's valuation expert in lieu of the appraisal process set out in the Operating Agreement. Plaintiff argued for and won the value of its interest in Federal Road under the Operating Agreement, including the value of its tag-along rights. For these reasons the Court finds Plaintiff's claims based on the value of Federal Road barred by collateral estoppel.

Because Plaintiff has been fully and completely compensated for ADS and Appleby's breach of fiduciary duty its fraud, aiding and abetting, tortious interference and civil conspiracy claims fail as they all arise from the actions breaching the Operating Agreement through the merger of Federal Road into ADS, which claims have been fully adjudicated and satisfied.

As part of its fraud claims, Plaintiff has also accused Defendants of displaying a lack of candor during the arbitration process by providing misleading or inaccurate testimony and by withholding documents. Previously, the Court upheld this claim, finding Georgia law recognizes such a cause of action in Butler v. Turner, 274 Ga. 566 (2001). Defendants now ask the Court to distinguish this authority on the basis that, unlike Butler, Plaintiff was a party to the arbitration proceeding allegedly called into question by Defendants' fraud and could therefore pursue other forms of redress available in that proceeding.



Defendants' point is well-taken. Indeed, the Butler court emphasizes the plaintiff "was not a plaintiff in the [suit at issue], had no control over the litigation, and expressly was not represented by the [plaintiff in the prior suit]." Butler, at 569. In view of this distinction and considering the Court of Appeals' later direction in Willet v. Stookey, 256 Ga. App. 403, 411 (2002)<sup>2</sup>, the Court grants Defendants' motion as to this issue.

Finally, Defendants argue claim preclusion also bars Plaintiff's claim for damages based on expenses it incurred in the appraisal process and subsequent litigation. In the arbitration award the panel found it was not appropriate to award Plaintiff's attorneys' fees because, in part, the Operating Agreement required both parties to bear their own litigation costs. Additionally, the panel held:

[T]he Panel is concerned about Etowah's delay in attempting to circumvent arbitration. And if attorneys' fees were awarded, Etowah would have to allocate the expenses between successful and unsuccessful claims asserted and those tainted by bad faith and those not, an exercise which we find to be impossible in this case.

Based on this portion of the award, Defendants argue collateral estoppel attaches to this portion of the arbitration award to conclusively bar Plaintiff's claim against Defendants for attorneys' fees.

In its prior Order, the Court found a distinction between the panel's attorneys' fees analysis under O.C.G.A. § 13-6-11, and the issue currently before the Court—which is whether Defendants' conduct caused damage to Plaintiff. In so holding, the Court focused on the different liability assessments each analysis would require—i.e., whether Appleby's conduct satisfied the threshold under O.C.G.A. § 13-6-11 versus whether Defendants' independent

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<sup>2</sup> "To the extent that [plaintiff] alleges that [defendant] had procured false testimony or fabricated documents in anticipation of trial, this amounts to a claim of conspiracy to commit perjury, or of perjury, for which there is no civil remedy." Willet, 256, Ga. App. at 411.

conduct caused damages, such as Plaintiff having to hire an appraiser and absorb litigation expenses. Previously, the Court found such issues distinct for res judicata purposes.

Now, upon second look, the Court finds its focus on liability too narrow. While the liability assessment undertaken by the arbitration panel may have been different than the issue here, they nevertheless considered identical damages evidence and found those damages impossible to appropriately allocate. Because Plaintiff's claims here rise and fall on the same obligation to establish damages and because the arbitration panel has already squarely adjudicated the issue of Plaintiff's damages and found it "impossible" to determine, the Court finds Plaintiff's claim for damages based on attorneys' fees incurred in the arbitration also barred by collateral estoppel. Accordingly, Defendants' motion is granted as to this issue.

In light of the Court's ruling on Plaintiff's claim for the "tag-along" value of Federal Road, Defendants' motion to exclude the report and testimony of Christopher Mercer is moot.

**SO ORDERED this 31st day of March, 2014.**

  
MELVIN K. WESTMORELAND, JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

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